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No. 01-10009

In the Supreme Court of the United States

OCTOBER TERM, 2001

Kevin Nigel Stanford
Petitioner.
v.

Phil Parker, Warden,
Kentucky State Penitentiary,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE

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QUESTION PRESENTED FOR REVIEW

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT APPLICATION OF THE DEATH PENALTY TO JUVENILE OFFENDERS IS A QUESTION COMPARABLE TO THE QUESTION DECIDED BY THIS COURT IN *ATKINS V. VIRGINIA* – WHETHER APPLICATION OF THE DEATH PENALTY TO MENTALLY RETARDED PERSONS IS PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS – AND THIS COURT SHOULD GRANT THE PETITION AND CONSIDER THE ISSUE

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SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR
WRIT OF HABEAS CORPUS

Pursuant to Supreme Court Rule 15.8, Kevin Stanford tenders this supplemental brief concerning the application of ***Atkins v. Virginia***, ____ U.S. _____, 122 S.Ct. 2242, 153 L.Ed. 2d 335 (2002) which was decided since the petition was filed.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT APPLICATION OF THE DEATH PENALTY TO JUVENILE OFFENDERS IS A QUESTION COMPARABLE TO THE QUESTION DECIDED BY THIS COURT IN *ATKINS V. VIRGINIA* – WHETHER APPLICATION OF THE DEATH PENALTY TO MENTALLY RETARDED PERSONS IS PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS – AND THIS COURT SHOULD GRANT THE PETITION AND CONSIDER THE ISSUE.

I. INTRODUCTION

On June 20, 2002, this Court decided ***Atkins v. Virginia***, *supra*. The purpose of this supplemental brief is to urge that ***Atkins*** should be applied by this Court to grant this petition and to then declare the execution of juvenile offenders unconstitutional. In *Atkins*, this Court considered the question of whether executions of mentally retarded people "are 'cruel and unusual punishment' prohibited by the Eighth Amendment to the Federal Constitution". In answering "yes", this Court relied generally on two lines of reasoning. First, the Court recognized the fact that the mentally retarded "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." ***Id***. Second, the Court considered the current prevailing standards of decency as reflected by objective standards such as legislatures, experts, and the public. ***Id***. at 2244, 2247.

Using the framework of the reasoning in ***Atkins***, it becomes clear that the execution of juveniles suffers from the same problems that led this Court to forbid the execution of the mentally retarded. Relying on ***Atkins***, this Court should invoke the

Eighth Amendment to the United States Constitution to end the execution of juvenile offenders. To act otherwise would be to ignore the basis for the decision in ***Atkins***.

II. JUVENILES DO NOT ACT WITH THE SAME DEGREE OF MORAL CULPABILITY AS ADULTS

In ***Atkins***, this Court described the mental status of the mentally retarded as follows:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 2250-51. Juveniles, because of their age, also suffer from significant "diminished capacities" in that they are less able to control their impulses and make reasoned judgments. A good deal of recent research shows strong scientific support for the fact that, biologically, juveniles lack the mental capacity to act with the same level of moral culpability as adults.

A. Physical and Emotional Makeup of the Adolescent

"Psychiatrists, psychologists and other child development experts recognize that adolescence is a transitional period between childhood and adulthood in which young people are still developing the cognitive ability, judgment and fully formed identity or character of adults."[1] To understand how the juvenile mental state mirrors that of the

[1] Brief of the American Society for Adolescent Psychiatry and The American Orthopsychiatric Association as **Amici Curiae** in support of petitioner ***William Wayne Thompson v. State of Oklahoma***, May 15, 1987, p. 267.

mentally retarded, four different areas of research must be looked at: lack of brain development, rapid physical changes during adolescence, cognitive and emotional deficits of adolescents, and the destructive and short-sighted nature of adolescent behavior.

1. Lack of Brain Development as a Basis for Poor Impulse Control and Decision-Making of Adolescents

Along with everything else in the body, the adolescent brain is experiencing significant development. Neuroscientific research in the last five years has discovered that adolescent brains are far from fully developed. "Brain researchers have wondered why the onset of puberty presages such turbulence, both for healthy kids and those affected by . . . psychiatric disorders."[2] The recent research suggests that the adolescent brain is "far less finished, and far more dynamic, than previously believed."[3] The nature of what's "missing" in a juvenile's brain helps explain the erratic behaviors and thought processes that are universal among adolescents and that will be detailed in later sections of this brief.

A neuroscientist at McMaster University in Ontario wrote, "The teenage brain is a work in progress. . . . and it's a work that develops in fits and starts."[4] "One of the last parts to mature is in charge of making sound judgments and calming unruly emotions."[5] And, the "prefrontal cortex, where judgments are formed, is practically asleep at the

[2] Landau, Misia. "Deciphering the adolescent brain." Focus: News from Harvard Medical, Dental & Public Health Schools. April 21, 2000.

[3] *Id.*

[4] Brownlee, Shannon. "Inside the teen brain: Behavior can be baffling when young minds are taking shape." *Lewis-Clark State College*. Undated. [http://www.lcsc.edu/ps205/inside.html]

[5] *Id.*

wheel. At the same time . . . the limbic system, where raw emotions such as anger are generated, is entering a stage of development in which it goes into hyperdrive."[6]

The prefrontal cortex is the supervisor of the brain; it "separates man from beast," enabling us to regulate our thoughts and to decide whether to cultivate or dismiss them.[7] It also plans, strategizes, and envisions consequences.[8] The preadolescent and adolescent neurological growth periods are bilateral, involving primarily frontal lobe connections.[9] Interestingly, frontal lobe abnormalities are associated with murder in adults.[10] As one expert has noted, when we get a violent thought in our heads, we recognize the thought as horrible and we are then able to dismiss it. Unfortunately, the part of our brain that allows us to think about our thought, to classify it as horrible and then take charge of its dismissal, is the very part of the brain, the prefrontal cortex, that undergoes more change during adolescence than any other part of the brain.[11] As a result, adolescents do not have the capacity to use the prefrontal cortex nearly as much as the amygdala, the more emotional and aggressive part of the brain.[12] Even the most sophisticated-appearing

[6] *Id.*

[7] Giedd, Jay. Interview with Public Broadcasting Services. Can be accessed online at www.pbs.org/wgbh/Pages/frontline/shows/teenbrain/interviews/giedd.html.

[8] Nelson, Charles. Interview with Public Broadcasting Services.

[9] Lewis, *Child and Adolescent Psychiatry: A Comprehensive Textbook*, p. 41.

[10] *Id.*, p. 337. *See also* Nelson, Charles. Interview with Public Broadcasting Services. An be accessed online at www.pbs.org/wgbh/Pages/frontline/shows/teenbrain/ interviews/nelson.html.

[11] Giedd, Jay. Interview with Public Broadcasting Services. Overproduction of gray matter similar to that in infancy as well as pruning of excess synaptic connections characterize the changes in the prefrontal cortex during adolescence.

[12] Yurgelun-Todd, Deborah. Interview with Public Broadcasting Services. Can be accessed online at www.pbs.org/whbh/Pages/frontline/shows/teenbrain/work/ onereason.html.

teenagers rely heavily on this emotional part of the brain, as MRI[13] scans have shown. Also, males use the amygdala much more than females, as the male prefrontal cortex develops more slowly than the female prefrontal cortex.[14] Quite simply, adolescents do not have the same ability as the rest of us to evaluate their thoughts, to judge them as right or wrong, and to stop them from determining their behavior. As a result, they are more impulsive.

2. Rapid Physical Changes During Adolescence

"Because of the profound character of the changes across the early adolescent period, this time of life -- more so than other developmental transitions -- represents a period of potential risk."[15] During adolescence, almost every part of the body is undergoing change; the physical composition of the brain, and even the skull bones thicken, lengthening and widening the head.[16]

In addition to the profound physical changes, adolescents also undergo dramatic hormonal changes. The pituitary gland releases hormones that trigger a great increase in the manufacture of two gonadotropic hormones.[17] The release of these hormones is so powerful that it can alter physical behavior, including causing changes in the sleep cycles

[13] Functional magnetic resonance imaging. "The scientists looked at the brains of 18 children between the ages of 10 and 18 and compared them to 16 adults using functional magnetic resonance imaging (fMRI). Both groups were shown pictures of adult faces and asked to identify the emotion on the faces. Using fMRI, the researchers could trace what part of the brain responded as subjects were asked to identify the expression depicted in the picture."

[14] Spinks, Sarah. "Adolescent Brains are a Work in Progress." Can be accessed online at www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html.

[15] Graber, Julia A., Jeanne Brooks-Gunn, and Anne C. Peterson, eds. *Transitions through Adolescence: Interpersonal Domains and Context*. Mahwah, NJ: Lawrence Erlbaum, 1996, p. 18.

[16] Cole, Michael, and Sheila R. Cole. *The Development of Children*. 4th ed. Worth Publishers: New York, NY. 2001, p. 609.

[17] *Id.*, p. 608.

of adolescents, who tend to feel tired during the morning and awake at night regardless of how much sleep they get.[18]

One of the hormones having the most dramatic effect on the body is testosterone. This hormone is associated with aggression. "During puberty . . . boys' levels [of testosterone] increase by 10 to 20 times."[19] In fact, "[s]everal laboratories have looked at hormones and their associations with adolescent aggression and problem behavior. Normal adolescent boys and delinquent boys showed a positive association between testosterone levels and aggression scores."[20]

3. Cognitive and Emotional Development of Adolescents

"[An adolescent is] not yet an independent, mature, resolute, strong, young adult. The adolescent is really both part child and part adult."[21] Normal adolescent narcissism occurs as part of the maturation process. "Adolescents tend to think that other people are as interested in what they are thinking and doing as they are themselves."[22] This self-focused perception is what leads to self-consciousness, feelings of uniqueness ["you don't understand what my life is like"] and the need for privacy so common to adolescents.[23] It also leads to the self-destructive "personal fable," in which adolescents think what happens to others will not happen to them and therefore engage in sensation-

[18] Carskadon, Mary, "When Worlds Collide: Adolescent Need for Sleep Versus Societal Demands," in *Adolescent Sleep Needs and School Starting Times*, editor Kyla Wahlstrom, Phi Delta Kappa Educational Foundation, 1999. Also see Dement, William C. *The Promise of Sleep*. Dell Paperback 1999, p. 85.

[19] Adams, Gerald R., Raymond Montemayor, and Thomas P. Gullota, eds. *Psychosocial Development during Adolescence*. Thousand Oaks, CA: Sage Publications, 1996, p. 286. Also see Cole et al., *The Development of Children*, p. 609.

[20] Adams et al., *Psychological Development during Adolescence*, p. 284.

[21] Lewis, *Child and Adolescent Psychiatry: a Comprehensive Textbook*, p. 287.

[22] Cobb, Nancy J. *Adolescence: Continuity, Change, and Diversity*. Mountain View, CA: Mayfield Publishing, 1998, p. 125.

seeking and risky behaviors.[24] As a result of such egocentrism, almost no adolescents have reached a stage of moral reasoning in which they can truly see themselves as members of a community, subjecting their own desires to its laws so that the community may function.[25] A teenager's "need to be independent" is often in part a selfish desire to escape feeling like part of a family, the very feeling the teenager's parents are seeking from him.[26]

Most adolescents are just entering a form of thought in which they can consider events that may only exist as possibilities for them.[27] In one study, 40 percent of high school males and 18 percent of high school females said it was okay for a male to force sex upon a female who was drunk.[28] Furthermore, multiple studies have found that 20 to 30 percent of high school students report seriously considering committing suicide.[29] Indeed, adolescence is a time when little thought is given to the teenager's sense of "moral responsibility" to the community due to the inability to see past one's own world and personal preoccupations.

[23] *Id.*, p. 172.

[24] *Id.*

[25] *Id.*, p. 147.

[26] Kegan, Robert. *In Over Our Heads*. Cambridge, MA: Harvard University Press, 1994, pp. 15-36.

[27] Cobb. *Adolescence: Continuity, Change, and Diversity*, p. 124. See also Kegan, *In Over Our Heads*, pp. 15-36.

[28] Schwartzberg, Allan Z., ed. *The Adolescent in Turmoil*. A monograph of the International Society for Adolescent Psychiatry. Westport, CN: Praeger, 1998, p. 6.

[29] *See, e.g.* Schwartzberg, *The Adolescent in Turmoil*, p. 8, and Cole, et al., *The Development of Children*, p. 624.

4. The Destructive and Short Sighted Nature of Adolescent Behavior

The physical and emotional turmoil that characterizes adolescent development can have disturbing results. "From a clinical perspective, there is widening recognition that severe psychological difficulties and psychiatric syndromes often appear in adolescence, which place young people at risk for drug use, criminality, and suicide, as well as for psychiatric disorders and impaired personal relationships throughout their lives."[30]

Many adolescents engage in self-destructive behaviors without even realizing the risk they are taking. These behaviors take different forms for different youths. Statistics reflect the immaturity with which these young people act. "One in four sexually active U.S. adolescents contract a sexually transmitted disease; this level is twice that of people in their twenties."[31] In 1993, researchers found that adolescents more often utilize avoidant coping strategies [e.g. listening to music, playing sports, sleeping, drinking alcohol] than approach-oriented coping strategies [e.g. trying to directly solve the problem, seeking help and guidance from someone about the problem] to deal with negative affective experiences.[32] Escapism, in various forms, is popular. "Suicide for adolescents between 15 and 19 years old is the third leading cause of death, closely behind motor vehicle accidents and homicide"[33], and the "best annual estimate of

[30] Reiss, David, with Jenae M. Neiderhiser, E. Mavis Hetherington, and Robert Plomin. *The Relationship Code: Deciphering Genetic and Social Influences on Adolescent Development.* Cambridge, MA: Harvard University Press, 2000.

[31] Cole et al., *The Development of Children*, p. 624.

[32] Lewis, *Child and Adolescent Psychiatry: A Comprehensive Text.*, p. 287.

[33] Straus, Martha B. *Violence in the Lives of Adolescents.* New York, NY: Norton, 1994, p. 31.

adolescent runaways is between 1.3 and 1.4 million."[34] Lastly, "[d]riving under the influence of alcohol is reported by 17 percent of high school students."[35]

Violence among youth is a common form of self-destructive behavior, as adolescents have not yet developed a full appreciation of risks and are unable to understand consequences. In fact, aggressive behavior is such a staple of adolescence that "[o]ne third to one-half of all referrals to child and adolescent outpatient clinics are problems related to conduct, antisocial behaviors, and aggressiveness."[36]

Research also shows various stressors in adolescents are powerful triggers of violent behavior. The American Academy of Pediatrics has identified several risk factors that can trigger violence in adolescents including domestic violence, substance abuse by the parents or other family members, inappropriate supervision, exposure to violence in the home, and physical assault, among others.[37] Undoubtedly, some of these factors combined to trigger K. in Stanford's behavior, as he was left unsupervised, physically and sexually abused and exposed to alcohol abuse throughout his childhood.

Of course, not all adolescents engage in substance use and/or violence. But, most of them engage in some form of delinquency. "The commission of illegal acts is more common during adolescence than during any other portion of the life course and this age-specific peak is widely distributed throughout the population. Estimates of the proportion of males who have been arrested before the age of 18 range between 25 percent and 45

[34] *Id.*, p. 54.

[35] Cole et al., *The Development of Children*, p. 624.

[36] Schwartzberg, *The Adolescent in Turmoil*, p. 109.

[37] American Society of Pediatrics, Policy Statement, "*The Role of the Pediatrician in Youth Violence Prevention in Clinical Practice and at the Community Level,*" Pediatrics, Volume 103, Number 1, January 1999, pp. 173-181.

percent."[38] Naturally, the number of offenders is much higher than the number arrested: almost all adolescents commit one or more illegal acts before turning eighteen.[39] This peak in criminal activity during adolescence is "quite stable across different social contexts" and present in all of the cultures studied to date.[40]

While it is apparent that juvenile delinquency is extremely common, it is more often than not *grown out of* by adolescents. "Wolfgan, Figlio, and Sellin's (1972) widely cited birth cohort study showed that nearly half of those ever arrested by the age of 18 were one-time offenders."[41] Of those who are career criminals, almost none initiated criminal or even antisocial behavior after adolescence, lending more support to the argument that adolescence is a time of self-centered destructiveness, risk-taking and impulsivity.[42]

B. The Same Death Penalty Jurisprudence That Supports the Exclusion of the Mentally Retarded From the Death Penalty Likewise Supports the Exclusion of Juveniles From the Death Penalty

Clearly, the research shows that the juvenile brain suffers from many of the same deficiencies as that of the mentally retarded. Most significantly to the issue of whether these two classes of citizens should be excluded from eligibility for the death penalty is the fact that both juveniles and the mentally retarded have measurable deficits in reasoning, judgment, and impulse control. Therefore, neither group acts with the same degree of moral culpability as fully functioning adults. *See* ***Atkins***, *supra* at 2244.

[38] Graber et al., *Transitions through Adolescence*, p. 158.

[39] *Id.*, p. 141, Straus, *Violence in the Lives of Adolescents*, p. 80, and Schwartzberg, *The Adolescent in Turmoil*, p. 109.

[40] Graber et al., *Transitions through Adolescence*, p. 141, and Lewis, *Child and Adolescent Psychiatry*, p. 340.

[41] Graber et al., *Transitions through Adolescence*, p. 158.

Consequently, as this Court recognized in ***Atkins***, death penalty jurisprudence supports the exclusion of the mentally retarded from the death penalty. Further, the reasoning in ***Atkins*** reveals that, in light of what we know about the mental state of juveniles, the same reasoning applies to exclude them from the death penalty.

1. Use of the death penalty against juveniles does not serve the societal purposes of retribution and deterrence.

In ***Gregg v. Georgia***, 428 U.S. 153, 183 (1976), the Court identified "'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty." ***Atkins***, *supra* at 2251. "With respect to retribution -- the interest in seeing that the offender gets his 'just desserts' -- the severity of the appropriate punishment necessarily depends on the culpability of the offender." ***Id.*** Thus, this Court has consistently narrowed the application of the death penalty to apply only to the most serious class of murders. Using this reasoning, this Court found in ***Atkins*** that if the "average murderer" does not qualify for the death penalty, neither should the less culpable mentally retarded murderer. ***Id.*** Following the Court's analysis to its only logical conclusion, then the less culpable juvenile murderer should also not qualify for the death penalty.

With respect to deterrence, the theory is that the severity of the sentence will persuade the would-be criminal to forego his murderous conduct. Rejecting the thought that the concept of deterrence would have an effect on the mentally retarded, this Court in ***Atkins*** held:

> Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable -- for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses -- that also make it less likely that

[42] *Id.*, p. 148.

> they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Id. Again, as all of the research shows, juveniles are likewise less morally culpable due to similar cognitive and behavioral impairments. Therefore, it is unlikely that the notion of deterrence would have any effect on the potential juvenile offender either.

2. Juvenile offenders face an unacceptable risk of wrongful execution and should therefore be ineligible for the death penalty

In addition to finding that the purposes of retribution and deterrence would not be served by subjecting the mentally retarded to the death penalty, this Court in ***Atkins*** also found an unacceptable "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" ***Atkins***, *supra* at 2251 (quoting ***Lockett v. Ohio***, 438 U.S. 586, 605 (1978). This Court cited factors such as the possibility of false confessions, the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation and to provide meaningful assistance to their counsel, the fact that they are typically poor witnesses, and a demeanor that may wrongfully convey a lack of remorse, as contributing to the imposition of death sentences that may not be justified. ***Atkins***, *supra* at 2251-52.

The possibility of false confessions is a significant problem that likewise supports ending the juvenile death penalty. The same limitations that affect the ability of the mentally retarded to consider long-term consequences or defer to those in authority also apply to juveniles. For example, research findings consistently demonstrate that ***Miranda*** warnings are not well understood by juveniles.[43] One study found that juveniles

[43] Kaban, Barbara, and Tobey, Ann E., *When Police Question Children: Are Protections Adequate?*, Journal of the Center for Children and the Courts, 151 (1999).

had waived their rights to silence and counsel and made a statement regarding suspected felonies about 90 percent of the time, compared to approximately 60 percent of adults.[44]

Examples of juvenile offenders making false confessions to a murder abound. At age 16, Johnny Ross was convicted of rape and sentenced to death in Louisiana in 1975. ***State v. Ross***, 343 So.2d 722, 724 (La. 1977). Ross signed a waiver of his rights, and later claimed that his subsequent written confession was coerced by police. ***Id***. at 724-25. In 1977, when the mandatory death penalty provision of Louisiana's aggravated rape statute was invalidated by this Court, his death sentence was vacated and the case was remanded with instructions to impose a twenty-year sentence. ***Id***. at 728. In 1980, tests revealed that his blood type did not match that of the sperm found in the victim.[45] Presented with this evidence and a federal habeas corpus petition, the New Orleans District Attorney agreed to his release in 1981.[46] This is just one example of the dozens of recent cases of juveniles making false confessions that have been overturned due to exonerating evidence.[47]

[44] Grisso, Thomas and Pomicter, Carolyn, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 Law & Human Behavior 321 (1977).

[45] Bedau, Hugo Adam and Radalet, Michael, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stanford Law Review 21, 157 (1987).

[46] *Id.*

[47] *See, e.g.*, "Beale's Changing Statements," 6/4/01 *Washington Post* A08 (6/4/01); April Witt, "FALSE CONFESSIONS: In Pr. George's Homicides, No Rest for the Suspects" *Washington Post* A01 (6/4/01); Ken Armstrong, Maurice Possley and Steve Mills, "Officers ignore laws set up to guard kids: Detectives grill minors without juvenile officers, parents present," *Chicago Tribune*, December 18, 2001; Maurice Possley and Steve Mills; "Crime Lab Analysts Hit as Three Seek New Trials: Testimony Disputed in '86 Slaying Case," *Chicago Tribune*, January 27, 2001 at 5.

In some extraordinary cases, juveniles confessed to murders but were later exonerated because they were incarcerated at the time of the crime.[48] In another class of disturbing cases, police secured false confessions from multiple juveniles while investigating a single homicide.[49] It is obviously well documented that the risk of false confessions from the mentally retarded should apply with equal force to juveniles to prohibit the execution of those under the age of 18.

This Court also pointed out in ***Atkins*** the danger that using mental retardation as a mitigating factor can be a "two-edged sword" that may actually support the aggravating factor of future dangerousness in the jury's eyes. ***Atkins***, *supra* at 2252. Indeed, Mr. Stanford suffered from the same "two-edged sword" when he attempted to use his age as a mitigating circumstance. The trial judge specifically found that age was not mitigating in his case.

Based on all of these above factors, the Court concluded, "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution." ***Atkins***, *supra* at 2252. These same factors work to create such unacceptable "special risk" for juveniles.

C. Conclusion

In finding that the United States Constitution forbids the execution of the mentally retarded, this Court in ***Atkins*** relied in part on the fact that the mentally retarded are less

[48] *See, e.g.*, Steve Mills & Maurice Possley, "'Killer's in Jail When Crime Committed; Teen Accuses Cops of Coercing Him into Admitting Guilt, *Chicago Tribune*, April 29, 1998; Maurice Possley & Steve Mills, "When Jail is no Alibi in Murders" *Chicago Tribune*, 1 (12/19/01).

[49] *See, e.g.*, Michael D. Sorkin "Teens Cleared of Killing Homeless Man in Alton" *St. Louis Post-Dispatch*, p. 1A (7/17/90) (involving false confessions of four teens); Louis J. Rose, "3 Men Arrested, Released in National Case File," *St. Louis Post-Dispatch*, 9B (5/5/89) and Bill Smith & Carolyn Tuft "Other Counties are Not Immune to Making Mistakes, Convicting the Innocent" *St. Louis Post-Dispatch* (4/12/98) (re the case of teens Anthony Benn and Ricky Williams); Brian Wheeler, "Despite Confession, Grand Jury Indicts Another Man in Triple Shooting Case" *The Capital* (Annapolis, MD.) p. 16 (11/30/94) (involving false confession of Wardell W. Johnson, age 16); "Youth Cleared in Slaying" *St. Louis Post-Dispatch* 1A (1/27/89) (re the case of Dustan Pennington, age 16).

culpable than other offenders. Therefore, the death penalty does not serve the traditional purposes of retribution, because mentally retarded offenders are not the "worst of the worst" for whom our judicial system reserves the death penalty for; or of deterrence, because mentally retarded offenders are not able to appreciate any deterrent effect. Furthermore, the reduced capacity of mentally retarded defendants puts them at an increased risk, for several reasons, that the death penalty will be wrongfully imposed.

Uncontroverted scientific evidence shows that juveniles are likewise less physically and emotionally developed and therefore less culpable than other offenders. Therefore, the traditional purposes of retribution and deterrence are also lost on juveniles. Furthermore, the reduced capacity of juveniles puts them at an increased risk that the death penalty will be wrongfully imposed. Any other conclusion would be contrary to the reasoning in ***Atkins***. Because this Court in ***Atkins*** found these factors sufficient to hold that the Eighth Amendment to the Constitution forbids the execution of the mentally retarded, this Court is likewise compelled to find that the Eighth Amendment to the United States Constitution prohibits the execution of juveniles.

III. BASED ON OBJECTIVE STANDARDS THAT CURRENTLY PREVAIL, THE EXECUTION OF JUVENILES IS CONTRARY TO THE CRUEL AND UNUSUAL PUNISHMENT PROHIBITION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

At the heart of the prohibition against cruel and unusual punishment is the idea that the punishment must be proportional to the crime. ***See Atkins***, *supra* at 2246-47. The definition of proportionality is found in the standards that currently prevail, not those in force at the time the Eighth Amendment took effect. ***Id.*** at 2247. Exactly what

standards prevail should be determined by "objective factors to the maximum possible extent." ***Id***. (citation omitted)

In applying this proportionality review to determine the unconstitutionality of executing the mentally retarded, this Court considered legislation as the "most reliable objective evidence of contemporary values." ***Id***. (citation omitted) In addition to reviewing the legislative trends, the Court considered the positions of organizations with germane expertise, of religious communities, of the world community, and of the American public. ***Id***. at 2249, n. 21. Finally, this Court considered its own judgment on the issue. ***Id***. at 2247-48. In the end, this Court concluded that the practice of executing the mentally retarded "has become truly unusual, and it is fair to say that a national consensus has developed against it." ***Id***. at 2249.

Using all of the same objective standards employed by this Court in ***Atkins***, it is evident that a national consensus has likewise developed against the execution of juveniles. A comparison of the prevailing views on the issue of executing the mentally retarded with those on the issue of executing juveniles shows that the consensus against the execution of juveniles is equal to if not greater than that against execution of the mentally retarded.

A. Legislation on the Issue of the Juvenile Death Penalty

At the time of ***Stanford v. Kentucky***, 492 U.S. 361 (1989), 11 states established 18 as the minimum age of eligibility for the death penalty, 4 states established 17 as the minimum age, and 22 states established age 16 as the cutoff. ***Id***. at 371. One state, New Hampshire, had conflicting statutes at the time, with one statute setting eligibility at age 17 and one at age 18. In ***Stanford***, the Court concluded that the legislation did not

establish the degree of national consensus sufficient to declare the execution of a 16 or 17 year old to be cruel and unusual punishment.

In comparison, today 16 states have established 18 as the minimum age of death eligibility, 5 states have established 17 as the minimum age, and 17 states have established 16 as the minimum age.[50] No state has lowered the age of eligibility to either 16 or 17, despite the green light to do so in ***Stanford***. Instead, state legislatures have moved in precisely the opposite direction.[51]

Since ***Stanford***, five states have created new law forbidding the juvenile death penalty. Most recently, Indiana raised its statutory minimum age from 16 to 18 years old.[52] The Montana Legislature did the same thing in 1999.[53] When New York reinstated the death penalty in 1995, its statute set the minimum age at 18 for eligibility of the death penalty.[54] The State of Kansas' 1994 reenactment of the death penalty likewise set the minimum age for death penalty eligibility at 18.[55] Finally, the State of Washington abolished the juvenile death penalty in a Washington Supreme Court ruling. ***State v. Furman***, 858 P.2d 1092, 1103 (Wash. 1993). Furthermore, the District of Columbia, the Military Courts, and the Federal Government all proscribe the death penalty for those under age eighteen.

[50] Streib, Victor L., *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-June 30, 2002* (July 15, 2002) (unpublished manuscript available at http://www.law.onu.edu/faculty/streib/juvdeath.pdf)

[51] *Id.*

[52] S.426, 112th Leg., Reg. Sess., 2002 In. Laws.

[53] H.B. 374, 1999 Leg., Reg. Sess., 1999 Mt. Laws.

[54] N.Y. Crim. Proc. Law §400.27 (McKinney 2002).

[55] Kan. Crime. Code Ann. §21-4622 (Vernon 2001).

In addition to the definitive action taken by these five states, all legislative efforts in other states show a trend towards abolition of the juvenile death penalty. In ***Brennan v. State***, 754 So.2d 1, 7 (Fla. 1999), Florida raised its minimum age for eligibility for the death penalty from 16 to 17 years old. Ten other states that currently use the death penalty are considering legislation to raise the minimum age for eligibility to 18: Arizona, Arkansas, Florida, Kentucky, Mississippi, Missouri, Nevada, Pennsylvania, South Carolina, and Texas. This is the most legislative attention the issue has been given in twenty years.[56]

Paired with the 12 states that do not permit capital punishment for persons of any age, a total of 28 states currently prohibit the execution of juvenile offenders, while 22 states allow such executions. This closely parallels the numbers on the mental retardation issue at the time of the ***Atkins*** decision, with 30 states prohibiting the execution of the mentally retarded compared to 20 jurisdictions permitting such executions. In ***Atkins***, these numbers prompted this Court to conclude:

> The large number of states prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id. at 2249.

1. Consistency of the Trend Away From Executing Juveniles

In considering the importance of the legislative movement, this Court in ***Atkins*** commented that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." ***Id***. at 2249. The large number of states banning

[56] Streib, Victor L., *The Juvenile Death Penalty Today*, p. 7.

executions of the mentally retarded "carries even greater force" when the overwhelming support such legislation received is considered. ***Id***.

A similarly large amount of support is seen in recent legislative efforts to abolish the juvenile death penalty. The Indiana legislation was passed by a vote of 44-3 in the Senate and 83-10 in the Assembly.[57] The Montana legislation passed by a margin of 44-5 in the Senate and 85-15 in the Assembly.[58] Even in Washington, where the action was accomplished by the Washington Supreme Court, all Justices of the Court concurred in the decision abolishing the juvenile death penalty. ***State v. Furman***, 858 P.2d 1092 (Wash. 1993).

In Florida, the bill[59] passed the Senate 34-0, but the House of Representatives did not vote on the measure by the end of the session. Even in Texas, the only state that executes juvenile offenders with any regularity, the bill[60] passed the House 72-42 before becoming stalled in the Senate without a vote. In New Hampshire, the legislature voted to abolish the death penalty completely in 2000, thereby necessarily including juveniles.[61]

Like the trend away from executing the mentally retarded, the efforts to end the executions of juveniles are receiving near unanimous support. This fact strengthens the impact of the position already taken by over half of the states outlawing the juvenile death penalty.

[57] Indiana State Legislature Archive (2002), 7/16/2002 SB 0426.

[58] Montana Legislative Archive (1999) Detailed Bill Information HB 374.

[59] Florida SB 1212 (2002).

[60] H.J. of Tex., 77th Leg., R.S. page 3098 (2001).

[61] New Hampshire HB 1548.

2. The Practice of Executing Juveniles Has Become "Unusual"

The second factor used by this Court in ***Atkins*** to bolster the strong legislative stance against executing the mentally retarded is the fact that the practice of carrying out such executions is uncommon. ***Atkins***, *supra* at 2249. This factor also bolsters the case against executing juvenile offenders. Of the 22 states that retain the death penalty for juvenile offenders, only two have used this punishment with any frequency -- Texas and Virginia. These two states have carried out 16 of the 21 executions of juvenile offenders in the United States since 1976. Texas is responsible for 13 of the executions, and Virginia for 3.[62]

Five other states have carried out only one such execution -- Georgia, Louisiana, Missouri[63], Oklahoma, and South Carolina.[64] Clearly, these states are not closely tied to the punishment. Before these modern day singular executions, Louisiana last executed a juvenile in 1948, Georgia in 1957, Missouri in 1921, and South Carolina in 1948. Oklahoma had never executed a juvenile offender prior to 1999.[65]

This leaves 15 states that have not carried out a single juvenile execution, although permitted by law. Of these states, eight of them have no juvenile offenders on their death row, two states have one such offender, and four states have two.[66] As evidence of the continuing trend away from juvenile executions, in the last year, Virginia

[62] Streib, Victor L., *The Juvenile Death Penalty Today*,, pp. 4-5 (Table 1); Death Penalty Information Center, www.deathpenaltyinfo.org.

[63] Missouri's lone juvenile execution occurred on July 28, 1993, when the state executed Frederick Lashley. Furthermore, of the 213 juveniles sentenced to death in this nation since 1973, only 4 of those sentences have occurred in Missouri. Streib, Victor L., *The Juvenile Death Penalty Today*,p. 10 (Table 4).

[64] Streib, Victor L., *The Juvenile Death Penalty Today*, pp. 4-5 (Table 1).

[65] Streib, Victor L. *Death Penalty for Juveniles* (Indiana University Press 1987).

[66] Fact Sheet: The Juvenile Death Penalty in the United States (The American Bar Association 2002).

overturned the death sentence of its only juvenile on death row.[67] Larry Osborne, who had been on Kentucky's death row for crimes allegedly committed at age 17, was acquitted on retrial on August 1, 2002[68]. Furthermore, the reversal rate for death sentences imposed on juvenile offenders is 86%,[69] and juvenile death sentences have dropped in 2001 to only 1.8% of the total number of death sentences imposed in the United States since 1973.[70]

What these statistics show is that in the states that do retain the juvenile death penalty, there is little need to pursue legislation barring such executions because it is not much of an issue. This Court recognized this fact in ***Atkins***, and after noting that the execution of the mentally retarded is uncommon, recognized that "there is little need to pursue legislation barring the execution of the mentally retarded in those States [that do allow such executions]." ***Atkins***, *supra* at 2249. Likewise, there is little need for concerned organizations and members of the public to demand change, although support for such change may be high.

B. Other Objective Factors Support the Legislative Trends Away From Sanctioning Use of the Juvenile Death Penalty

After considering legislative support for abolishing the death penalty for mentally retarded offenders, this Court in ***Atkins*** looked at "[a]dditional evidence [that] makes it clear that this legislative judgment reflects a much broader social and professional consensus." ***Atkins***, *supra* at 2249, n. 21. Examining that same additional evidence as it

[67] *Washington Post*, 9/25/01. From the Death Penalty Information Center at www.deathpenaltyinfo.org.

[68] *Louisville Courier Journal*, 8/2/02, "Man Sent to Death Row is Acquitted in Retrial"

[69] Streib, Victor L., *The Juvenile Death Penalty Today* , p. 9.

[70] *Id.*, p. 14.

relates to the juvenile death penalty reveals a similar consensus against the use of this punishment.

1. Organizations With Germane Expertise Have Adopted Official Positions Opposing the Imposition of the Death Penalty Upon a Juvenile Offender

Opposition to the juvenile death penalty by expert organizations has been long-standing. In his ***Stanford*** dissent, Justice Brennan cited the following organizations, among others, that filed *amicus* briefs urging an end to juvenile executions:

> American Bar Association, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, American Society for Adolescent Psychiatry, American Orthopsychiatric Association, Defense for Children International - USA, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, Office of Capital Collateral Representation for the State of Florida, International Human Rights Law Group, and Amnesty International.

Stanford, 492 U.S. at 389, n.4.

Since ***Stanford***, the list of such organizations has continued to grow. The Constitution Project, a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues, established a blue-ribbon committee to develop reforms to address wrongful convictions in death penalty cases.[71] In its publication *Mandatory Justice, Eighteen Reforms to the Death Penalty*, the group explicitly recommended barring the death penalty for persons under the age of 18 at the time of the crime to reduce the risk of wrongful execution, ensure that the death penalty

[71] The 30-member Death Penalty Initiative committee describes itself in its mission statement: "We are supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. We are former judges, prosecutors, and other public officials, as well as journalists, scholars, and other concerned Americans. We may disagree on much. However, we are united in out profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been significantly diminished."

is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty.[72] The American Psychiatric Association, The American Academy of Child and Adolescent Psychiatry, The National Mental Health Association, The National Center For Youth Law, The Coalition for Juvenile Justice, and The American Humane Association have all joined this position and support the abolition of the juvenile death penalty.

2. Widely Diverse Religious Communities Oppose the Juvenile Death Penalty

This Court commented in ***Atkins*** on the number of different religions that filed *amicus* briefs in support of stopping executions of the mentally retarded. ***Atkins***, *supra* at 2249, n.21. Religious opposition to the juvenile death penalty dates back at least to the time of ***Stanford***, where the following groups filed *amicus* briefs advocating an end to executing juveniles:

> American Baptist Church, American Friends Service Committee, American Jewish Committee, American Jewish Congress, Christian Church (Disciples of Christ), Mennonite Central Committee, General Conference Mennonite Church, National Council of Churches, General Assembly of the Presbyterian Church, Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Commission for Racial Justice, United Methodist Church General Board of Church and Society, United States Catholic Conference, and West Virginia Council of Churches.

Stanford, 492 U.S. at 389, n. 4.

[72] The Constitution Project, *Mandatory Justice, Eighteen Reforms to the Death Penalty*, p.11(2001). Can be accessed on line at www.ConstitutionProject.org.

3. The World Community Overwhelmingly Opposes the Execution of Juveniles

The execution of juvenile offenders has all but ended in every nation but the United States.[73] Although domestic differences are small between the statutory bars on executing mentally retarded and juvenile offenders, the juvenile bar has so much more universal, codified support that it has achieved customary international law and, indeed, *jus cogens* status. The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights, and the U.N. Convention on the Rights of the Child (CRC) expressly prohibit the death penalty for juvenile offenders. The United States and Somalia (which has no recognizable government) are the only two countries that have failed to ratify the CRC. 191 nations have adopted the fundamental standards articulated in this treaty.[74]

In the last decade, the United States has executed more juvenile offenders than all other nations combined. Since 1990, only seven countries are reported to have executed prisoners who were under 18 years of age at the time of the crime -- The Democratic Republic of Congo, Iran, Nigeria, Pakistan, Yemen, Saudi Arabia, and the United States. The nations of Pakistan and Yemen have since abolished the juvenile death penalty, while Saudi Arabia and Nigeria deny that they have executed juvenile offenders.

In the last three years, the number of nations that execute juvenile offenders has dropped significantly to only three: Iran, the Democratic Republic of Congo, and the United States. Moreover, just this past year, Iran stated that it no longer executes juvenile

[73] Amnesty International, *"Fact Sheet"* (2002).

[74] Amnesty International, *The Death Penalty Worldwide* (2002).

offenders and the leader of the Democratic Republic of Congo commuted the death sentences of four juvenile offenders.

In an age of increasing global cooperation in areas ranging from travel and trade to common security and defense, continued juvenile executions violate international law, thus isolating the United States from the international community. The near unanimous position of the world community supports the legislative and other trends in this country showing a consensus against the execution of juveniles.

4. Public Opinion Shows a Consensus Among Americans that We Should Not Be Executing Our Children

Scientific studies confirm that the majority of Americans believe that the death penalty should not apply to juveniles.[75] In one study, only 35% of death-qualified mock jurors were willing to sentence 17-year-old defendants with the death penalty.[76] More recent studies substantiate this trend. A 2001 study showed that "while 62% back the death penalty in general, just 34% favor it for those committing murder when under the age of 18."[77] The same study cites a 2001 survey by the Princeton Survey Research Associates, which showed that 72% favored the death penalty for at least the most serious murders, but only 38% wanted it applied to juveniles under 18.[78] Similarly, a May 2002 Gallup poll showed that 69% of Americans oppose the practice of executing juveniles.[79] And the University of Kentucky Survey Research Center's Spring 2000 Kentucky Survey

[75] *See, e.g.*, Skovron, Sandra Evans, Joseph E. Scott, and Francis T. Cullen. *Crime and Delinquency*, October 1989 v35 n4 pp546-561.

[76] Finkel, N.J., Hughes, K.C., Smith, S.F., & Hurabiell, M.L., "Killing kids: The juvenile death penalty and community sentiment." *Behavioral Sciences and the Law*, 12, 5-20 (1994).

[77] Smith, Tom W., "Public Opinion of the Death Penalty for Youths." National Opinion Research Center, University of Chicago, prepared for the Joyce Foundation, p. 2 (December 2001).

[78] *Id.*

found that 79.5% of those surveyed believed the most appropriate punishment for a juvenile convicted of aggravated murder was a sentence other than death.

When the National Opinion Research Center study looked at the Midwest, it revealed an even smaller number of Midwesterners supportive of the juvenile death penalty than the nation's population as a whole. While 59.9% of the Midwest supported the death penalty, only 31.5% came down in favor of supporting the juvenile death penalty.[80] Indeed, with Indiana's recent statute repealing the death penalty, Missouri is the lone Midwestern state with the juvenile death penalty on its statute books.

Public opinion is also revealed in the actions of juries. The rate of juvenile death sentencing fluctuated greatly in the years following the reinstatement of the death penalty, and slowed to an average of approximately 2% of the total number of death sentences in the mid-1980s. In the mid to late 1990s, the rate ranged from approximately 2% to 6%. In the last few years, however, the juvenile death penalty sentencing rate has declined significantly to an average of 1.7% per year. Thus far in 2002, no juvenile death sentences have been verified.[81] These statistics demonstrate that not only is the public opposed in theory to the execution of juveniles, but in fact, juries often in practice refuse to impose death sentences on juvenile offenders.

C. Conclusion

Under the current objective standards that prevail today, there is clearly a national consensus against executing juveniles. A look at all of the standards employed by this Court in ***Atkins*** shows that this consensus is comparable to, if not stronger than, that

[79] Gallup News Service, "Slim Majority of Americans Say Death Penalty Applied Fairly," (May 20, 2002).

[80] *Id.*, p. 8 (Table 3).

against the execution of the mentally retarded. Furthermore, such consensus as to juveniles appears to be longer standing in many respects than the more recent wave of opposition to executing the mentally retarded. To conclude that these standards of decency prohibit the execution of the mentally retarded, but that the same standards do not prohibit the execution of juveniles would be an inconsistent application of the law. Therefore, based upon ***Atkins***, this Court is should conclude that the execution of juvenile offenders violates the United States Constitution.

IV. CONCLUSION

Only two states, Texas and Virginia, even remotely embrace the juvenile death penalty. Even Texas, which has accounted for over half of the modern era juvenile executions, now shows a strong trend in the other direction by easily passing a ban on juvenile executions through their House last year.

In comparison to the execution of the mentally retarded, which is now illegal, execution of juvenile offenders is *less* frequent and *less* widespread. Since 1976, 24 persons with mental retardation were executed, while 21 juveniles were executed during the same period.[82] 10 states have carried out at least one execution of the mentally retarded, while 7 states have executed juveniles. 7 states have carried out two or more executions of the mentally retarded, while only 2 states have done so of juvenile offenders. Under these circumstances, if our current standards of decency prohibit the execution of the mentally retarded, they also prohibit the execution of juveniles. This Court's conclusion in ***Atkins*** that the execution of the mentally retarded "has become

[81] Streib, Victor L., *The Juvenile Death Penalty Today*, p. 14.

[82] Death Penalty Information Center, www.deathpenaltyinfo.org.

truly unusual, and it is fair to say that a national consensus has developed against it." ***Atkins***, *supra* at 2249, applies equally to the issue of juvenile executions.

This consensus against executing juveniles is easy to understand in light of the physical and emotional deficiencies of juveniles, which make them unable to act with the same degree of moral culpability as normally functioning adults. Significantly, modern research shows that the very part of the brain that controls impulses, regulates our thoughts, and intervenes to stop inappropriate behavior has not developed in adolescents. It is exactly these deficiencies in the mentally retarded -- lack of reasoning, judgment, and impulse control -- that prompted this Court in ***Atkins*** to hold the execution of the mentally retarded unconstitutional. ***Atkins***, *supra* at 2244. Statistics show that opposition to the juvenile death penalty has been long-standing and continues to grow. Now that scientific research has established that juveniles are in fact less culpable than other offenders, this Court should take the next step and declare the juvenile death penalty to be a violation of the cruel and unusual punishment clause.

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